PP

v.

RAMANATHAN CHELLIAH

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
ABU SAMAH NORDIN JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: W-09-4-2005]
11 JULY 2008

CRIMINAL PROCEDURE: *Judgment - Delay in writing - Trial judge's delay of five years in preparing grounds of judgment - Whether prejudicial to accused*

EVIDENCE: *Standard of proof - End of prosecution's case - Whether wrong standard of proof applied - Failure of justice - Maximum evaluation of evidence*

The respondent was convicted for offences under s. 354 of the Penal Code by the trial judge. His subsequent appeal was allowed by the High Court judge, who found that the trial judge's delay of five years in writing the judgment was prejudicial to the respondent. The High Court judge also held that the trial judge had applied the wrong standard of proof at the end of the prosecution's case in her grounds of judgment, thus occasioning a failure of justice that was incapable of being cured under s. 422 of the Criminal Procedure Code. Hence, the present appeal by the Public Prosecutor against the High Court judge's decision.

Held (allowing the appeal)
Per Zainun Ali JCA delivering the judgment of the court:

(1) On the facts, delay *per se* in preparing the grounds of judgment in this appeal would not prejudice the respondent since the trial judge had analysed the evidence and considered the demeanour and credibility of the main witnesses, as evidenced in the notes of proceedings. Clearly, unfairness and prejudice in this regard had not been sufficiently established. Unquestionably, the issue raised as to the demeanour and credibility of witnesses had been given due consideration by the trial judge. The High Court judge had fallen into error in finding otherwise. (para 7)

(2) On the question of the standard of proof, the trial judge in this appeal had applied the correct standard of proof in following the case of *Tan Boon Kean v. PP* (in her grounds of judgment). Even if she had referred to and followed the standard determined by the case of *Khoo Hi Chiang v. PP* (in the proceedings), the trial judge applied the same standard of proof *ie*, maximum evaluation of the evidence since the difference between the standard of proof in both cases was basically a difference in semantics only. Therefore, the trial judge in applying the correct standard of proof at the end of the prosecution's case had not misdirected herself. In this regard, there was no prejudice or unfairness *vis-à-vis* the respondent since the trial judge had undertaken, not a minimum, but a maximum evaluation of the evidence at the close of the prosecution's case. (paras 13, 14 & 15)

[Setting aside decision of High Court, and affirming decision of trial judge; sentence imposed by trial judge reinstated.]

Bahasa Malaysia *Translation Of Headnotes*

Responden telah disabit bagi kesalahan-kesalahan di bawah s. 354 Kanun Keseksaan oleh hakim perbicaraan. Rayuan berikutnya telah dibenarkan oleh hakim Mahkamah Tinggi, yang memutuskan bahawa kelewatan selama lima tahun oleh hakim perbicaraan dalam menulis penghakiman itu telah memudaratkan responden. Hakim Mahkamah Tinggi juga memutuskan bahawa hakim perbicaraan telah menggunakan tahap membukti yang salah pada penghujung kes pendakwaan dalam alasan-alasan penghakimannya, oleh itu menyebabkan suatu kegagalan keadilan yang tidak dapat dibetulkan di bawah s. 422 Kanun Prosedur Jenayah. Oleh itu, Pendakwa Raya telah merayu terhadap keputusan hakim Mahkamah Tinggi.

Diputuskan (membenarkan rayuan)
Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta, kelewatan *per se* dalam menyediakan alasan-alasan penghakiman tidak memudaratkan responden kerana hakim perbicaraan telah membuat analisis keterangan dan telah mempertimbangkan perilaku dan kredibiliti saksi-saksi utama, seperti yang diterangkan dalam nota-nota prosiding. Dengan jelas, ketidakadilan dan prejudis dalam hal ini tidak dibuktikan dengan cukup. Memang tidak dipersoalkan, isu yang dibangkit

mengenai perilaku dan kredibiliti saksi-saksi telah diberi pertimbangan yang sewajarnya oleh hakim perbicaraan. Hakim Mahkamah Tinggi telah khilaf dalam memutuskan sebaliknya.

(2) Berkenaan soalan tahap membukti, hakim perbicaraan dalam rayuan ini telah menggunakan tahap membukti yang betul apabila mengikuti kes *Tan Boon Kean v. PP* (dalam alasan-alasan penghakimannya). Walaupun beliau telah merujuk pada dan mengikut tahap yang telah ditentukan oleh kes *Khoo Hi Chiang v. PP* (dalam prosiding), hakim perbicaraan telah menggunakan tahap membukti yang sama, iaitu, penilaian maksima keterangan kerana perbezaan di antara tahap membukti dalam kedua-dua kes itu pada asasnya suatu perbezaan semantik sahaja. Oleh itu, hakim perbicaraan dalam menggunakan tahap membukti yang betul pada penghujung kes pendakwaan tidak menyalaharankan dirinya. Berkenaan dengan hal ini, tidak ada apa-apa prejudis atau ketidakadilan berhubungan dengan responden kerana hakim perbicaraan telah menjalankan penilaian keterangan yang maksima dan bukan minima pada penghujung kes pendakwaan.

[Mengenepikan keputusan Mahkamah Tinggi, dan mengesahkan keputusan hakim perbicaraan; hukuman yang dikenakan oleh hakim perbicaraan dikenakan semula.]

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Jai Adam v. PP [1996] 1 CLJ 482 HC ***(refd)***
Khoo Hi Chiang v. PP And Another Case [1994] 2 CLJ 151 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Tan Hun Wah v. PP And Another Appeal [1994] 2 CLJ 180 SC ***(refd)***
Tara Singh And Others v. PP [1948] 1 LNS 70 ***(refd)***
TN Nathan v. PP [1977] 1 LNS 127 ***(refd)***
Voon Chin Fatt v. PP [1948] 1 LNS 149 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), 271, 422

For the appellant - Jamhirah Ali (Eddie Yeo DPP with her)
For the respondent - Karpal Singh (Ramkarpal Singh & Sangeet Kaur with him); M/s Karpal Singh & Co

[Editor's note: For the High Court judgment, please see Ramanathan Chelliah v. PP [2005] 1 CLJ 858.]

Reported by Suresh Nathan

JUDGMENT

Zainun Ali JCA:

[1] After having heard submission of parties we allowed the appeal, set aside the High Court decision and affirmed the decision of the trial judge.

Our grounds are as follows:

[2] We find that delay in providing grounds of judgment by the trial judge will not *per se*, vitiate its decision (*Tan Hun Wah v. Public Prosecutor And Another Appeal* [1994] 2 CLJ 180; *Voon Chin Fatt v. Public Prosecutor* [1948] 1 LNS 149; *T.N. Nathan v. Public Prosecutor* [1977] 1 LNS 127)

[3] The question before us is this: Is there miscarriage of justice in this appeal?

(a) The learned High Court judge in his appellate capacity, found that "such a long delay in writing his judgment could indeed blur a judge's decision especially in coming to a conclusion based on the credibility of witnesses, which includes their performance in the witness box, their *demeanor et al*, which forms the foundation of making a properly evaluated finding".

[4] The learned High Court judge found that the trial judge had failed to make remarks or observations of the witnesses' demeanour which the trial judge is permitted to do under s. 271 of the Criminal Procedure Code.

[5] The trial judge found that after a protracted delay there is every likelihood of prejudice of mistake when considering their credibility. In fact he said, an observation of witnesses credibility made too long after the trial should be of little or no weight.

(b) We scrutinized four relevant documents closely ie.

(i) the notes of proceedings;

(ii) the decision of the learned trial judge;

(iii) the judgment of the trial judge and

(iv) the judgment of the High Court judge.

(c) Contrary to his finding that "there was nothing mentioned in the notes of evidence on the trial judge's observation on the demeanour of the witnesses", we find that the trial judge's notes are replete with them. In fact the learned High Court judge seemed to have contradicted himself as clearly seen at p. 5 of his grounds of judgment.

(d) Our own scrutiny of the trial judge's detailed notes of proceedings clearly manifested careful appraisal by the said judge of the material witnesses as to their demeanour and circumstances in determining their credibility.

(e) For instance the trial judge reminded the accused no less than three times (at pp 313, 354 & 413 of notes of proceedings) on the need to be cautious in his testimony when it appeared that his testimony seemed contradictory.

[6] The trial judge accepted the evidence of SP1 as a witness of truth and observed that SP2 is both honest and reticent. The trial judge also rejected the evidence of defendant witnesses that of SB2, SB3 and SB6 based on their credibility.

(f) Clearly the trial judge formed her impression of the witnesses whose evidence were tested critically against the totality of their evidence *Tara Singh And Others v. Public Prosecutor* [1948] 1 LNS 70. We are satisfied that the trial judge had scrupulously recorded her observations and made remarks of the witnesses as the trial unfolded. These remarks and observations were made contemporaneously. This therefore leaves little room for contending that the trial judge's assessment would be less than accurate or that her observation was blurred or blunted by the passage of time.

[7] Thus both the learned High Court judge's and the respondent's contention that s. 271 Criminal Procedure Code had not been complied with in this respect does not hold any ground here, since the utility of s. 271 is in itself, discretionary.

(g) Delay *per se* in preparing the grounds of judgment in this appeal would not prejudice the respondent, since the trial judge had analysed the evidence and considered the demeanour and credibility of the main witnesses as clearly evidenced in the notes of proceeding. Clearly, unfairness and prejudice in this regard, had not been sufficiently established. (See *Jai Adam v. Public Prosecutor* [1996] 1 CLJ 482)

A (h) Unquestionably, we find that the issue raised as to the demeanour and credibility of witnesses had been given due consideration by the trial judge. The learned High Court judge had fallen into error in finding otherwise.

B (i) On the question of standard of proof applied by the trial judge which found disfavour by the learned High Court judge, it is our view upon scrutinising the notes of proceedings, that the trial judge had applied the correct standard of proof at the end of the prosecution case. The trial judge invoked the then s. 173(f) C Criminal Procedure Code where the language of "if unrebutted warrants a conviction" had been found to it being a "beyond reasonable doubt" standard of proof (*Khoo Hi Chiang v. Public Prosecutor And Another Case* [1994] 2 CLJ 151) after a maximum evaluation of the prosecution evidence.

D (j) The respondent's ground of appeal on this issue was that the trial judge expressed in her grounds of judgment five (5) years later, that the standard of proof adopted at the close of the prosecution case was the test laid down in the case of *Tan Boon Kean v. Public Prosecutor* [1995] 4 CLJ 456, that of *"prima facie"* E standard, which the respondent alleged, departed from the principle laid down in *Khoo Hi Chiang*. The respondent submitted that, in 1997 the Federal Court in *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 restored the test as that laid down in *Khoo Hi Chiang*, which means that when the trial judge applied F the test in 2001 in her grounds of judgment, using *Tan Boon Kean* (*prima facie* standard of proof), the standard of proof used was no longer good law.

(k) The respondent went on to state that this gross confusion on G the trial judge's part amounted to a serious misdirection which vitiated the entire proceeding. The respondent argued that the misdirection was so serious, it was incapable of being cured under s. 422 Criminal Procedure Code. The learned High Court judge agreed with the respondent on the argument that the trial judge H had used an incorrect standard of proof which she applied five (5) years after the trial in evaluating the prosecution witnesses which is not curable under s. 422 Criminal Procedure Code. The learned High Court judge found that the delay in writing the grounds of judgment, had resulted in the blunting of the trial judge's I observation leading to misdirection on the part of the trial judge.

The High Court also found that the trial judge had erred in applying the wrong legal burden of proof, thus occasioning a failure of justice.

[8] We are conscious that the trial judge's decision was delivered on 8 November 1996 ie, about three (3) weeks after a lengthy proceeding which ended on 8 October 1996 and copious notes were recorded and maintained, including remarks and observations. The facts and evidence were still very much alive in the mind of the trial judge when she delivered her decision three weeks after the close of the case.

(l) On this point we would like to make an observation. Make no mistake that we are unanimous in our view that delay in preparing and supplying grounds of judgment in itself is a malaise that must be resisted as far as possible. It is an aberration much to be abhorred. However, a distinction must be made between delay in delivering decisions and delay in providing grounds of judgment.

[9] If there is a long delay in giving a decision after the close of the case, then it may be acceptable that this could cause prejudice to the accused person and miscarriage of justice may be occasioned. If on the other hand, a decision had been made and delivered soon or within a reasonable period after the close of the case (as happened in this appeal), BUT the grounds of judgment was only prepared and provided at a much later date such as five (5) years later as in this case, the prejudice could not be as immense or as stark unless it can clearly be shown there is unfairness and clear jeopardy. In this appeal, the respondent could not have shown these. In any case, he was out on bail and was not languishing behind bars waiting for his appeal to be heard.

(m) On the question of the standard of proof, our view is simply this. Though the majority decision in *Arulpragasan* held that the test at the close of the prosecution's case was beyond reasonable doubt which means a maximum evaluation of evidence should be undertaken by the court, the decision in *Tan Boon Kean* went the other way. It stood for the "*prima facie* test".

[10] However it must be noted that the Federal Court in *Tan Boon Kean* agreed with the principle established in *Khoo Hi Chiang* that the quantum of proof at the close of the prosecution's case is based on the maximum evaluation of evidence.

[11] The terminology may differ, but both the majority and minority were united on the point that the court must undertake a maximum evaluation of evidence at the close of the prosecution's case.

[12] This observation is manifested in *Looi Kow Chai & Anor v. Public Prosecutor* [2003] 1 CLJ 734. And again in the Federal Court case of *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85, the maximum evaluation test was applied. Augustine Paul FCJ speaking for the Federal Court held that at the close of the prosecution's case, the court must undertake a positive evaluation of the credibility and reliability of all evidence adduced by the prosecution.

[13] In view of the above, the trial judge in this appeal had, in our view, applied the correct standard of proof in following the case of *Tan Boon Kean* (in her grounds of judgment). Even if she had referred and followed the standard determined by *Khoo Hi Chiang* based on the above analysis, the trial judge applied the same standard of proof, ie, maximum evaluation of the evidence since the difference between the standard of proof in both *Tan Boon Keang* and *Khoo Hi Chiang* is basically a difference in semantics. The importance lies in its quantum which in both, are the same.

[14] Thus, in our view the trial judge in applying the correct standard of proof at the end of the prosecution's case had not misdirected herself.

[15] In this regard, we failed to see where lies the prejudice or unfairness *vis-à-vis* the respondent since the trial judge had undertaken not a minimum but a maximum evaluation of the evidence at the close of the prosecution's case.

[16] We also found that the findings of the Sessions Court judge which had been alluded to earlier, where she accepted the evidence of material witnesses, SP1 and SP2 and that the ingredients of the offence with which the respondent had been charged, was successfully proven by the prosecution (see pp 619-624 and 664 AR and p. 621 AR) were correct and proper. We find no misdirection of the facts and evidence on the part of the trial judge.

[17] A proper findings of facts and the application of the correct legal principles by the trial judge, clearly seen in the 95 over pages of the grounds of judgment, ought not be disturbed. In view of the above, we therefore find no good reason for appellate intervention, much less order a retrial for hearing this appeal on its merits as proposed by the respondent.

[18] We are unanimous in allowing this appeal. The decision of the learned High Court judge is hereby set aside. The decision of the trial judge is hereby affirmed. The sentence imposed by the trial judge is reinstated.

[19] The respondent must now serve his sentence as imposed by the trial judge, forthwith.

[20] My learned brothers Sulong Matjeraie, JCA and Abu Samah Nordin, JCA have seen this judgment and have agreed that it be the judgment of the court.